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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

RICHARD M. MITCHELL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the "contrary to law" provision of 18 U.S.C. § 545 encompasses conduct contrary to mere administrative regulations.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Richard M. Mitchell hereby petitions for a writ of certiorari to review the judgment and opinion in this case of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-27a) is reported at 39 F.3d 465 (4th Cir. 1994). The order of the court of appeals denying the petition for rehearing (App. 36a-37a) is not reported. The August 13, 1993 judgment and commitment order of the United States District Court for the Eastern District of Virginia (App. 29a-35a) and the district court's August 17, 1993 order denying petitioner's motion for judgment of acquittal, or, alternatively, for a new trial (App. 28a), are not reported.

JURISDICTION

The opinion of the court of appeals was entered on November 3, 1994. Rehearing was denied on December 30, 1994. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title 18, Section 545 of the United States Code provides, in pertinent part, that

> Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law—
>
> Shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 545.

STATEMENT

On June 3, 1992, a grand jury sitting in the Eastern District of Virginia returned a nine-count indictment against petitioner Richard Mitchell. Count Nine of the indictment charged petitioner with importing animal horns and hides into the United States contrary to law, in violation of 18 U.S.C. § 545 (App. 2a), which makes it a felony, punishable by up to five years imprisonment, to "import[] or bring[] into the United States, any merchandise *contrary to law*" (emphasis added). Count Nine further alleged that the importation of the horns and hides was contrary to law solely because it contravened certain Customs Service, Fish and Wildlife Service, and Department of Agriculture regulations that required petitioner to make various declarations upon importation. App. 2a-3a.

1. Petitioner moved to dismiss Count Nine of the indictment on the grounds that the "contrary to law" provision of Section 545 does not criminalize conduct contrary to administrative regulations, and, alternatively, that a felony conviction under Section 545 could not be predicated upon violation of regulations for which Congress expressly had provided misdemeanor penalties. App. 3a. The district court denied petitioner's motion without opinion. *Id.*

The case was tried before a jury in May 1993. Petitioner was acquitted of Counts One through Eight, but the jury returned a general verdict convicting him of violating 18 U.S.C. § 545 as charged in Count Nine. App. 3a-4a. Petitioner thereafter moved for a judgment of acquittal or, in the alternative, for a new trial on Count Nine, which the court denied without opinion. *Id.* Petitioner was placed on probation for a term of two years and fined $1,000. *Id.* at 4a.

2. A divided court of appeals, over Judge Murnaghan's dissent, rejected petitioner's contention that the "contrary to law" provision of Section 545 reaches only conduct that violates acts of Congress, not conduct that violates administrative regulations. The panel declared that the plain meaning of "law" includes regulations having the force and effect of law, and that this meaning would control unless the legislative history demonstrated that Congress clearly intended a contrary meaning. *Id.* at 5a. The court also relied on the fact that Congress reenacted the "contrary to law" provision in 1922 and 1930, when, according to the panel, "it was well settled" that "law" included regulations having the force and effect of law, because of the decision in *Estes* v. *United States*, 227 F. 818 (8th Cir. 1915), of which the court presumed Congress was aware. App. 5a-7a. The court was not persuaded by the existence of other provisions in the 1922 and 1930 reenactments which referred to "law and regulations." *Id.* at 6a.

The court also rejected petitioner's contention that a felony conviction under Section 545 cannot be predicated upon the violation of regulations for which Congress specifically has provided misdemeanor penalties. See 16 U.S.C. § 1540(b) (penalty provision for criminal violations of the Endangered Species Act of 1973 and regulations promulgated thereunder); 21 U.S.C. § 122 (penalty provision for violations of 21 U.S.C. § 111, and regulations promulgated thereunder). First, the court noted the strong presumption against a finding of repeal by implication. App. 12a. The court reviewed the legislative histories of the statutes pursuant to which the relevant regulations were promulgated and concluded that Congress did not intend either to be the exclusive means of prosecuting violations of these regulations. *Id.* at 13a-14a. This conclusion, the court noted, was in accord "with the *majority of cases* dealing with repeal by implication in the context of a later enactment providing a lesser penalty for the same conduct subject to greater punishment under an earlier statute." *Id.* at 15a-16a (emphasis added).

Judge Murnaghan dissented, concluding that "it is grievously ambiguous whether failure to comply with a regulation is included within the statutory phrase 'contrary to law,' and that the rule of lenity should therefore be applied." *Id.* at 22a-23a. He observed that the panel gave "little attention to the confusion necessarily arising from the fact that many statutes say 'law and regulations,' and yet § 545 says only "contrary to law." *Id.* at 23a-24a (footnotes omitted). He undertook a close examination of the *Estes* case, and concluded that the majority's reliance on *Estes* was misplaced. *Id.* at 24a. Although the dissent found most of the Section 545 cases cited by petitioner and the government "unilluminating" as to whether "contrary to law" extends to regulatory violations, it stated that these cases "contribute[d] abundantly to the creation of ambiguity." *Id.* at 26a.

REASONS FOR GRANTING THE PETITION

The recurring and important issue of the meaning of the statutory term "contrary to law" was decided by the court of appeals in a way that perpetuates the longstanding confusion among the circuits on this issue. The need for uniform construction of this language is particularly acute because the phrase "contrary to law" is found in numerous federal criminal statutes and because the consequences attaching to this question of statutory construction involve the imposition of criminal liability including grievous loss of individual liberty. Accordingly, this Court should grant certiorari to resolve the acknowledged conflict and provide guidance to the lower courts in the interpretation of this federal criminal statute.

1. Although the "contrary to law" language currently codified at 18 U.S.C. § 545 has been part of the United States Code since 1866 (see An Act Further To Prevent Smuggling And For Other Purposes, ch. 201, § 4, 14 Stat. 178, 179 (1866)), before the decision below, no court had squarely held that this provision reached conduct that violated no statutory enactment but was merely contrary to administrative regulations. The decisions of this Court and the courts of appeals reveal analyses both supporting the conclusion reached by the Fourth Circuit and squarely at odds with the holding below.

The confusion regarding the proper construction of "contrary to law" can be traced to this Court's decisions in *United States* v. *Eaton*, 144 U.S. 677 (1892), and *United States* v. *Grimaud*, 220 U.S. 506 (1911). In *Eaton*, the Court considered whether failure to comply with a regulation promulgated pursuant to a statute subjected a defendant to penalties prescribed in that statute for "omit[ing], neglect[ing] or refus[ing] to do, or caus[ing] to be done, any of the things *required by law*." 144 U.S. at 685-86 (emphasis added). The Court held that it did not, stating that "[i]f Congress intended to make [violation of the regulation] an offence[,] . . . it would have done so distinctly." *Id.* at 688. The Court noted that reg-

ulations "may . . . have . . . the force of law[,] but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offence in a citizen, where a statute does not distinctly make the neglect in question a criminal offence." *Id.* In *Grimaud*, 220 U.S. at 514, the Court faced a similar issue—whether to sustain a conviction for violating regulations promulgated by the Secretary of Agriculture pursuant to the Forest Reserve Act of 1891. The Court distinguished *Eaton* and affirmed the conviction because the statute in question punished violations "of the provisions of this act *or such rules and regulations of the Secretary*," whereas the statute construed in *Eaton* contained no such express reference to regulations. *Id.* at 519 (emphasis added).

The opinion of the Eighth Circuit in *Estes* v. *United States*, 227 F. 818 (8th Cir. 1915), upon which the court below principally relied, reflects confusion as to the proper application of *Eaton* and *Grimaud*. In *Estes*, the defendant was charged with violating the predecessor to 18 U.S.C. § 545 by importing cattle into the United States without having them inspected by the Bureau of Animal Industry. *Id.* at 819. The defendant, relying on *Eaton*, argued that there was no law, within the meaning of the statute, that required such inspection. *Id.* at 820-21. The court held that "it was proper to allege in the indictment that the cattle in question had . . . been imported and brought into the United States from the republic of Mexico contrary to law" because regulations promulgated by the Secretary of Agriculture mandated inspection of all animals imported into the United States. *Id.* at 821-22. The *Estes* court relied on *Grimaud* to distinguish *Eaton*, apparently not recognizing that the statute under consideration in *Grimaud* explicitly extended to violations of regulations. *Id.* at 821. As the dissent below observed, the "contrary to law" provision of Section 545 lacks any such reference to regulations, thereby substantially undermining the *Estes* court's reliance on the *Grimaud* decision. See App. 24a.

For these reasons, the panel's reliance on *Estes* seems misguided, at best. The panel noted that the "contrary to law" provision now codified at Section 545 was reenacted in 1922 and 1930, after the *Estes* decision. *Id.* at 6a. Because Congress is presumed to be aware of judicial interpretations of a statute, the panel reasoned that Congress adopted the *Estes* interpretation when it reenacted the "contrary to law" language without change. *Id.* at 6a-7a. This analysis proves too much; it is more likely that Congress was aware of this Court's decisions in *Eaton* and *Grimaud* and the distinction drawn in those cases between statutes that expressly punish violations of regulations and those, such as Section 545, that do not. The legislative history cited by the panel thus supports the conclusion that the failure of Congress to amend Section 545 reflected an understanding that "contrary to law" did not encompass regulations. This interpretation, moreover, is consistent with the references to "law and regulations" elsewhere in the 1922 and 1930 acts, which the court below simply dismissed. *Id.* at 6a.

A number of other cases support the conclusion that "contrary to law" does not reach conduct that violates no statutory provisions. In *Keck* v. *United States*, 172 U.S. 434, 437 (1899), this Court stated that "importing merchandise is not *per se* contrary to law, and could only become so when done in violation of specific *statutory* requirements" (emphasis added). Similar reasoning was followed by the courts in *Goldberg* v. *United States*, 277 F. 211, 217 (8th Cir. 1921) ("contrary to law" means contrary to "some other act of Congress"); *Palmero* v. *United States*, 112 F.2d 922, 925 (1st Cir. 1940) ("to ascertain what is contrary to law reference must be made to some other *statutory* provision") (emphasis added); and *United States* v. *Lee*, 937 F.2d 1388, 1397 (9th Cir. 1991) ("one must always look to another *statute* . . . to determine whether a violation of section 545 has taken place"), *cert. denied*, 502 U.S. 1076 (1992) (emphasis added). Strict ad-

herence to this language by the Fourth Circuit unquestionably would have led to reversal of petitioner's conviction. See also *United States* v. *Menon*, 24 F.3d 550, 558 (3d Cir. 1994) (indictment sufficient even though it "did not specify the *statute* [defendant] had violated") (emphasis added); *United States* v. *Claybourn*, 180 F. Supp. 448, 451 (S.D. Cal. 1960) (Section 545 makes it a crime to "fail[] to comply with other *statutes*") (emphasis added).

Conversely, a number of cases contain language indicating that Section 545 prosecutions may be predicated merely upon violations of regulations. In *Goldman* v. *United States*, 263 F. 340 (5th Cir. 1920), the defendant argued that he should not be subject to double penalties as a result of prosecution under both the predecessor to Section 545 and another statute that imposed civil penalties. The court stated that "contrary to law" meant "in violation of any regulation . . . established by law." *Id.* at 343. Because the prosecution was predicated on a statutory violation and the distinction between law and regulations was not raised, however, the language extending Section 545 to regulatory violations is mere *dicta.*

Duke v. *United States*, 255 F.2d 721 (9th Cir.), *cert. denied*, 357 U.S. 920 (1958), and *Murray* v. *United States*, 217 F.2d 583 (9th Cir. 1954), are companion cases arising out of the prosecution of a group of individuals for smuggling and conspiring to smuggle birds from Mexico. In both cases, the court upheld convictions for Section 545 violations which apparently were premised upon importations "contrary to" a regulation promulgated by the Surgeon General, but the distinction between statutes and regulations in the context of Section 545 clearly was not at issue in either case. *Duke*, 255 F.2d at 723-24; *Murray*, 217 F.2d at 584-85. Similarly, in *United States* v. *Murphree*, 783 F.2d 605 (6th Cir.), *cert. denied*, 479 U.S. 839 (1986), the court upheld a Section 545 conviction based on the violation of a regulation, and the court in *United States* v. *Ivey*, 949 F.2d 759

(5th Cir. 1991), *cert. denied*, 113 S. Ct. 64 (1992), affirmed a Section 545 conviction premised on violations of a statute and a regulation. In neither case, however, did the parties raise or the court address whether "contrary to law" embraces conduct that is only contrary to regulations and violates no federal statutes.

The confusion engendered by the cases interpreting Section 545 is heightened by the use of "contrary to law" in other federal statutes. "Contrary to law(s)" appears at least 30 times in the United States Code, including several criminal statutes. See, *e.g.*, 18 U.S.C. § 544 (importations "contrary to law"); 18 U.S.C. § 1425 (making it a felony to procure, "contrary to law," the naturalization of any person); 18 U.S.C. § 1693 (making it a crime to carry mail "contrary to law"); 18 U.S.C. § 1697 (same); 19 U.S.C. § 1590 (transportation and possession of merchandise introduced into United States "contrary to law"); 19 U.S.C. § 1595a (seizure and forfeiture of merchandise introduced into United States "contrary to law" and of vessels used for same). The doctrine of *in pari materia* suggests that the courts should interpret similar statutory language in a consistent manner, and this rule applies with special force in the context of federal criminal statutes. See, *e.g.*, *Kungys* v. *United States*, 485 U.S. 759, 769-70 (1988) (interpreting "material" in the context of federal criminal statutes).

The potential for confusion absent guidance from this Court on the proper construction of "contrary to law" is exacerbated by the presence of numerous statutes which define prohibited or reviewable conduct as "contrary to law or regulation." See, *e.g.*, 10 U.S.C. § 618(a)(1) ("contrary to law or regulation"); 10 U.S.C. § 5898 (same); 14 U.S.C. § 261(a) (same); 14 U.S.C. § 289(f) (same); 14 U.S.C. § 290(d) (same); 21 U.S.C. § 134a ("contrary to any law or regulation"); see also 22 U.S.C. § 4137 ("contrary to laws or regulations" and "contrary to law" in same statute); 33 U.S.C. § 1233 (authorizing issuance of "regulations, not contrary to law"). These

provisions suggest, as stated by the Court in *Eaton*, 144 U.S. at 688, and contrary to the position taken by the court below, that when "Congress intend[s] to make [violation of regulations] an offence[,] . . . it [does] so distinctly." Given the importance of this issue, and the widespread use of the controversial statutory language in question, this Court should grant certiorari to resolve the confusion concerning the construction of "contrary to law" in Section 545 and other federal criminal statutes.

2. The decision below also presents the Court with the opportunity to clarify the relationship between two principles of statutory construction, the rule of lenity and the presumption against repeals by implication, as articulated in *United States* v. *Batchelder*, 442 U.S. 114 (1979), in the context of an ambiguous criminal statute. The court of appeals treated the issue of the proper construction of "contrary to law" and the issue of repeal by implication as two separate inquiries. First, the court found that the legislative history of Section 545 did not indicate that Congress intended to limit "contrary to law" to statutory violations. App. 5a. Second, the majority held that the question of repeal was governed by *Batchelder*, 442 U.S. at 121-22, which, in turn, held that prosecution under one statute is not improper merely because another statute provides a lesser penalty. App. 11a-12a, 14a. Although the court acknowledged the existence of a split among the circuits on the issue of repeal by implication, it questioned the continuing validity, in light of *Batchelder*, of those cases finding repeal by implication, such as *United States* v. *Omirly*, 488 F.2d 353 (4th Cir. 1973), and *United States* v. *Mueller*, 178 F.2d 593 (5th Cir. 1949). App. 15a-17a.

In *Omirly*, the defendant was convicted of making a false bomb threat while attempting to board an airplane, a misdemeanor under 49 U.S.C. § 1472(m)(1) (1976). *Omirly*, 488 F.2d at 355. She contended that she should have been prosecuted under 18 U.S.C. § 35(a), which had been amended to provide only a civil fine for such

violations. *Id.* The Fourth Circuit agreed, resting its holding on (1) the legislative history of § 35(a), which indicated an intent to repeal § 1472(m)(1) as applied to defendant's conduct, and (2) a finding that the two statutes were repugnant in their provisions for criminal penalties, including possible incarceration, on the one hand, and a civil fine, on the other. *Id.* at 356-57; see also App. 17a.

The court below distinguished *Omirly* on the grounds that it found no "clear statement of legislative purpose" to support a finding of repeal by implication in this case, and that the second basis for the *Omirly* decision, the conflict between the imposition of civil as opposed to criminal penalties, is no longer valid in light of the *Batchelder* decision. App. 17a. The court similarly concluded that the *Mueller* case, which turned on whether Congress' later enactment of a provision dealing specifically with lottery tickets manifested an intent to repeal the predecessor of Section 545 with respect to the importation of lottery tickets, also was undermined by *Batchelder. Id.*; see also *Callahan* v. *United States,* 285 U.S. 515, 518 (1932) (predecessor to Section 545 superseded the general provisions of a prior statute embracing the same subject).

Batchelder, however, does not control this case. In *Batchelder,* 442 U.S. at 121-22, this Court held that no conflict inheres in the fact that two statutes provide different penalties for the same conduct, and that legislative intent to repeal must be evident in a "positive repugnancy," *id.* (quoting *United States* v. *Borden Co.,* 308 U.S. 188, 189 (1939)), between the two statutes. The Court rejected the rule of lenity as a principle of construction because "in the instant case there is no ambiguity to resolve." *Id.* at 121. Moreover, the Court found ample evidence in the relevant legislative history that Congress intended that the two statutes at issue would "take nothing from" but merely "add to" and

"complement" one another. *Id.* at 120 (quoting 114 Cong. Rec. 14774, 16286 (1968)). Finally, the Court noted that a finding of repeal by implication would lead to anomalous results. *Id.* at 121 n.7. Based on the foregoing, the Court found no conflict or "positive repugnancy" between the statutes.

By treating separately the construction of "contrary to law" and the issue of repeal by implication, the court below failed to recognize that both issues are part and parcel of the same inquiry into the meaning of Section 545. The court was untroubled by the split among the circuits as to repeal by implication because it read *Batchelder* as resolving the conflict, while at the same time relying on *Batchelder* to resolve the apparent conflict between two statutes, when it is not clear whether Section 545 even applies to the conduct at issue. This Court's decision in *Simpson* v. *United States,* 435 U.S. 6 (1978), suggests that in such a case the presumption against implied repeals arguably gives way to the rule of lenity. In *Simpson,* the Court considered whether Congress intended to subject the defendant to multiple penalties for a single criminal transaction. The Court held that to construe one statute to allow the additional penalty authorized by that statute to be added to the penalty already provided by another statute would violate the rule of lenity. *Id.* at 14. The Court also relied on a "corollary of the rule of lenity" which gives "precedence to the terms of the more specific statute where a general statute and a specific statute speak to the same concern," stating that this guide to statutory construction "has special cogency where a court is called upon to determine the extent of the punishment to which a criminal defendant is subject." *Id.* at 15.

This analysis suggests that the distinction drawn by the court below between the construction of "contrary to law" and the issue of repeal by implication was an artificial one, and that the court's reliance on *Batch-*

elder was misplaced. This Court should grant certiorari to resolve the apparent conflict between application of the rule of lenity and the presumption against implied repeals in the interpretation of ambiguous criminal statutes and to clarify both the relationship between *Batchelder* and *Simpson*, and whether *Batchelder* undermines the validity of cases such as *Omirly* and *Mueller*.

* * * *

This Court should grant certiorari to resolve the confusion in the lower federal courts on the proper construction of "contrary to law" in Section 545 that has its source in this Court's own prior decisions. Interpretation of this federal criminal statute presents an issue of fundamental and recurring importance, both in terms of the consequences to defendants of inconsistent application by the lower courts and because the "contrary to law" language is contained in numerous other federal criminal provisions. In addition, this case affords the Court an opportunity to clarify the appropriate mode of statutory construction when an ambiguous statute arguably criminalizes conduct for which another statute provides lesser penalties.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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